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No. 87-771

In the Supreme Court of the United States

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether the doctrine of issue preclusion required the Federal Energy Regulatory Commission to adhere to the interpretation of a statute it adopted in a declaratory proceeding to which petitioner was a party, even though the former interpretation was upheld on judicial review solely on the ground that it was a reasonable construction of the statute and the Commission subsequently concluded that the former interpretation of the statute was erroneous.

2. Whether, prior to its amendment in 1986, Section 7(a) of the Federal Power Act, 16 U.S.C. 800(a), granted a municipality a preference as against the original licensee in a proceeding to relicense an existing hydroelectric power project.

3. Whether, in a proceeding to relicense a hydroelectric power project, the Commission may consider the economic impact upon consumers of transferring the license from the original licensee to a new licensee.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-56a) is reported at 826 F.2d 1074. The opinion of the court of appeals panel (Pet. App. 57a-92a) is reported at 775 F.2d 366. The opinion of the Federal Energy Regulatory Commission (Pet. App. 95a-198a) is reported at 25 F.E.R.C. (CCH) ¶ 61,052. The Commission's order denying rehearing (Pet. App. 93a-94a) is reported at 25 F.E.R.C. (CCH) ¶ 61,290. The initial decision of the administrative law judge (Pet. App. 199a-309a) is reported at 23 F.E.R.C. (CCH) ¶ 63,037.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1987. The petition for a writ of certiorari was filed on November 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *The Bountiful Dam Declaratory Proceeding*

The Federal Power Act, 16 U.S.C. (& Supp. IV) 791a *et seq.*, authorizes the Federal Energy Regulatory Commission to grant licenses to public and private entities for the development of hydroelectric power projects. A license may be granted for a term of up to 50 years; upon the expiration of the license, the United States may recover the project for its own use, the Commission may issue a new license to the original licensee, or the Commission may issue a new license to a new licensee. 16 U.S.C. (& Supp. IV) 799, 807-808.[1] Prior to its amendment in 1986, Section 7(a) of the Act, 16 U.S.C. 800(a), provided in pertinent part that:

> [i]n issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under [the statutory provision relating to relicensing] the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted * * * to conserve and utilize in the public interest the water resources of the region * * *.

A number of the hydroelectric power licenses awarded in the 1920s were due to expire in the 1970s. In 1978, the cities of Bountiful, Utah, and Santa Clara, California, filed petitions for "declaratory orders" requesting a determination by the Commission as to whether Section 7(a) provided a preference for a municipality as against the "original licensee" in a proceeding to relicense an existing

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[1] Compensation must be paid to the original licensee in the event the project is taken over by the United States or the license is awarded to a new licensee. 16 U.S.C. (& Supp. IV) 807(a), 808(a).

hydroelectric power project (C.A. App. 1).[2] On September 27, 1978, the Commission issued a "Notice of Petitions for Declaratory Orders and Notice of Consolidation," which consolidated the Santa Clara and Bountiful petitions on the ground that they presented "similar or perhaps the same questions of law."[3] Thereafter, on May 3, 1979, the Commission issued an order granting several motions to intervene in the consolidated proceeding (*id.* at 1-4).[4]

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[2] Under Section 15 of the Federal Power Act, 16 U.S.C. (& Supp. IV) 808, the "original licensee" is the party to whom the Commission awarded the license when the project was initially licensed or any successor standing in the shoes of that licensee during the term of the original license (see Pet. App. 371a-372a & n.40).

[3] The unpublished notice is reproduced in Appendix B to the Commission's supplemental brief on rehearing in the court of appeals.

[4] Both Pacific Power & Light Company (PP&L) and petitioner intervened in the *Bountiful* proceeding. The Commission denied a motion filed by PP&L, whose original license for the Merwin Dam hydroelectric project had expired, to postpone the declaratory proceeding until the conclusion of the evidentiary hearing on the competing applications for a new license for the Merwin Dam project. Those competing applications, which are the subject of the present case (see pages 6-10, *infra*), had been filed by PP&L and by petitioner, an entity that qualifies as a municipality under the Act (see 16 U.S.C. 796(7)). In so ruling, the Commission stated (C.A. App. 2 (footnote omitted)):

> In this docket, we are faced with resolution of a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case. * * *.
>
> * * * Even if we should decide here that the section 7(a) preference does apply against an "original licensee" in relicensing proceedings, that determination would not foreclose either [petitioner] or PP&L from addressing in the proceeding for relicensing of the Merwin Project the particular circumstances of [petitioner], PP&L, and the Merwin Project and whether [petitioner] would be entitled to such a preference. Those are matters which

On June 27, 1980, the Commission issued its declaratory order in *City of Bountiful*, 11 F.E.R.C. (CCH) ¶ 61,337, reh'g denied, 12 F.E.R.C. (CCH) ¶ 61,179 (1980), aff'd *sub nom. Alabama Power Co.* v. *FERC*, 685 F.2d 1311 (11th Cir. 1982), cert. denied, 463 U.S. 1230 (1983).[5] The Commission ruled that Section 7(a) grants a preference to a municipal applicant in a relicensing proceeding, even as against the original licensee. Thus, if plans of the municipality are "equally well adapted," or could be made equal to, the plans of any other applicant, including the original licensee, the Commission would be required to issue the license to the municipality. Pet. App. 339a, 389a.

The Commission further stated that absent a record it could not specifically delineate the factors it would take into account in determining whether applicants' plans are "equally well adapted" within the meaning of Section 7(a) (Pet. App. 389a). The Commission did, however, provide "some generalizations about the public interest determination" under Section 7(a). Pet. App. 389a; see *id.* at 389a-393a. It stated that "Congress did not direct the Commission, in choosing among applicants, to limit its focus merely to plans in the physical or technical sense," but that the statute instead required consideration of the

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> may well involve material factual disputes between [petitioner] and PP&L and which, in any event, would not aid our determination of the issue of law before us in this docket. * * * [A]ssuming for the sake of argument that we decide the section 7(a) preference applies in relicensing cases—[petitioner] and PP&L may litigate in the relicensing proceeding on the Merwin Project the separate, specific question of whether [petitioner] is entitled to such a preference.

[5] The decisions of the Commission (Pet. App. 329-393a, 327a-328a) and the court of appeals (*id.* at 314a-326a) are reprinted in the appendix to the petition for a writ of certiorari in this case.

"broader social impacts [of relicensing] such as economic costs and benefits, the distribution of the benefits of hydropower and similar pertinent potential impacts" (*id.* at 389a, 390a-391a (footnote omitted)). Accordingly, the Commission directed Bountiful and other municipalities competing with original licensees in relicensing proceedings to develop records in individual cases from which the Commission would be able to determine which applicant's plans were "best adapted" to serve the public interest (*id.* at 392a).

The United States Court of Appeals for the Eleventh Circuit affirmed the Commission's determination (Pet. App. 314a-326a). The court said, "[w]e have reviewed the Commission's interpretation of this statute and deem such construction consistent with the statute's language, structure, scheme, and available legislative history. We must give great deference to the Commission's statutory interpretation" (*id.* at 325a). Applying the principle that " ' "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong," ' " the court upheld the Commission's interpretation of Section 7(a) (Pet. App. 326a (citation omitted)).

In response to certiorari petitions filed by the private parties challenging the court of appeals' ruling on the municipal preference issue, the Solicitor General, at the Commission's request, filed a brief stating that a majority of the members of the Commission appeared ready to overrule the *Bountiful* decision and adopt the contrary interpretation of the statute, under which a municipality would have no preference as against an original licensee. The Solicitor General therefore urged the Court to grant the petitions, vacate the judgment of the court of appeals, and remand the case to the Eleventh Circuit for further

proceedings. FERC Br. at 8-9, *Utah Power & Light Co.* v. *FERC,* 463 U.S. 1230 (1983). On July 6, 1983, this Court denied the petitions for certiorari.

2. ***The Merwin Dam Relicensing Proceeding***

a. The present case concerns the assignment of the license to operate the Merwin Dam hydroelectric project, located in the State of Washington. The original license for that project was granted in 1929 for a term of 50 years; the license was transferred to Pacific Power & Light Co. (PP&L) in 1941. Pet. App. 5a. As the successor to the original licensee, PP&L qualifies as the original licensee (see *id.* at 108a-109a, 371a-372a & n.40). PP&L filed an application for a new license in 1976. Petitioner, an entity formed by public utility districts surrounding the project, filed a competing application in 1977. Petitioner qualified as a municipality within the meaning of the statute (see 16 U.S.C. 796(7)), and asserted that it was entitled to the benefit of the Section 7(a) preference for municipalities. Both PP&L and petitioner participated as intervenors in the *Bountiful* proceeding. Pet. App. 5a.

Following an evidentiary hearing, the administrative law judge (ALJ), issued a decision granting the license to petitioner (Pet. App. 199a-309a). The ALJ found that petitioner's plans and the plans put forward by PP&L were "equally well adapted" to serving the public interest; under the Commission's decision in *Bountiful,* the ALJ concluded that petitioner was therefore entitled to the new license (*id.* at 283a).

The Commission unanimously reversed the ALJ's determination (Pet. App. 95a-198a). A majority of the Commission determined that the earlier decision in *Bountiful* regarding the effect of the municipal preference in re-

licensing proceedings where the original licensee is one of the applicants was erroneous "and should be overruled" on the ground that it was inconsistent with the statutory language, legislative history, and overall purpose of the statute (*id.* at 102a). The Commission concluded that the municipal preference is not applicable in relicensing proceedings as against the original licensee but is applicable only in a relicensing proceeding in which the original licensee does not seek to renew its license (*id.* at 102a-142a).[6]

The Commission unanimously concluded that PP&L was entitled to the license because its application was the best adapted "to conserve and utilize in the public interest the water resources of the region" within the meaning of Section 7(a) (see Pet. App. 124a-140a).[7] In the Commission's view, the proper focus of the "public interest [inquiry under Section 7(a)] is the impact on consumers of choosing between an 'original licensee' in possession of project works, and a 'new licensee' " (Pet. App. 149a). In light of the economic and other impacts on consumers in-

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[6] Two commissioners dissented from this portion of the decision (Pet. App. 194a-198a).

[7] Those commissioners who voted to overrule *Bountiful* applied the alternative standard set forth in Section 7(a): "as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicants to carry out such plans." Those commissioners who dissented from the decision to overrule *Bountiful* nevertheless agreed that the municipal preference would not apply unless the applications filed by the original licensee and the municipality were "equally well adapted to conserve and utilize in the public interest the water resources of the region" within the meaning of Section 7(a). Since the dissenters agreed that PP&L's application was superior to petitioner's, they, too, saw no occasion to apply the preference. Pet. App. 194a-198a.

volved in this case, the Commission held that petitioner's plans were not "equally well adapted" as those of PP&L and that the public interest therefore favored issuing the license to PP&L (*id.* at 149a-167a).

b. Petitioner sought review of the Commission's determination in the United States Court of Appeals for the District of Columbia Circuit (see 16 U.S.C. 825*l*(b)). A panel of the court of appeals reversed the Commission's determination (Pet. App. 57a-92a); and the full court of appeals granted rehearing en banc. While the case was pending before the en banc court, Congress amended Section 7(a) to eliminate the municipal preference in all relicensing proceedings except the present one. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, §§ 2, 11, 100 Stat. 1243, 1255.

The full court of appeals, by a divided vote, upheld the Commission's decision in part and vacated the decision in part (Pet. App. 1a-56a). The court first rejected petitioner's contention that principles of res judicata or collateral estoppel required the Commission to adhere to the interpretation of Section 7(a) adopted in the *Bountiful* declaratory order proceeding. The court observed that "[a] fundamental requisite of issue preclusion is an identity of the issue decided in the earlier action and that sought to be precluded in a later action" (Pet. App. 10a). It found that "the Eleventh Circuit neither addressed nor had the opportunity to address the specific issue (or claim) before us, namely the propriety of FERC's *present*, anti-*Bountiful* view that the municipal preference does *not* obtain in relicensings to which the incumbent licensee is a party. The Eleventh Circuit was, instead, called upon to assess the reasonableness of FERC's view enunciated in the short-lived *Bountiful* decision, namely that the preference applied in all relicensings. Its decision that *Bountiful* was

both consistent with the statute and otherwise reasonable does not, as a matter of law or logic, resolve the distinct issue of whether FERC's recent interpretation is also reasonable and in accordance with the statute" (*id.* at 11a (emphasis in original; citation and footnote omitted)).

The court also found preclusion inappropriate because both the Commission and petitioner argued in the *Bountiful* case that the municipal preference applied to all relicensings. The court stated that issue preclusion "attaches only to such issues as the parties litigated adversely to each other in the prior litigation" (Pet. App. 12a).[8]

Turning to the merits of the Commission's conclusion that the municipal preference does not apply in relicensing proceedings in which the original licensee seeks to renew its license, the court upheld the Commission's interpretation as "a reasonable reading of the statute" (Pet. App. 28a). The court agreed with the Commission that Section 15 of the Federal Power Act, 16 U.S.C. (& Supp. IV) 808, the statutory provision concerning relicensing proceedings, distinguishes between the issuance of a new license to the original licensee and the issuance of a new license to a new licensee. The Commission had concluded that, because the Section 7(a) preference applies only "in issuing licenses to new licensees under" Section 15, the preference did not apply in proceedings in which the original licensee sought a new license. The court found that this construction of the statute best comports with the statutory language and that the legislative history provides no support for a contrary interpretation. Pet. App. 28a-32a.

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[8] Applying the test set forth in *Retail, Wholesale & Dep't Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972), the court also concluded that principles of retroactivity did not bar the Commission from applying its new interpretation of Section 7(a) in the present proceeding (Pet. App. 14a-24a).

Finally, the court reviewed the Commission's assessment of the competing applications in this case. It first found that the Commission correctly concluded that it could consider the relative economic impact of an award of the license to one applicant or another (Pet. App. 33a-35a). It concluded, however, that the Commission's analysis of these economic impacts was insufficient and directed the Commission to provide a more complete explanation of its conclusion that, because PP&L would have to bear a higher cost if it was forced to obtain alternative sources of energy, the license should be awarded to PP&L (*id.* at 35a-38a).

Judge Mikva, joined by Judges Robinson and Edwards, dissented. They concluded that the Commission was required to adhere to the *Bountiful* ruling in this proceeding and that the Commission's new interpretation of Section 7(a) could not be sustained. Pet. App. 39a-56a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the question that underlies this controversy—the scope of the Section 7(a) municipal preference—is of no continuing importance because Congress has amended the statute to eliminate the municipal preference in relicensing proceedings. Although Congress allowed the present proceeding to continue under the former version of the statute, the court of appeals' resolution of the matter will have no effect beyond determining the controversy between these particular parties. We also note that this case is in an interlocutory posture: the court of appeals remanded the matter to the Commission for further explanation of the Commission's decision (see Pet. App. 38a). For all of these reasons, review by this Court is not warranted.

1. a. Petitioner first contends (Pet. 15-20) that principles of issue preclusion required the Commission to adhere to the interpretation of Section 7(a) adopted in the *Bountiful* declaratory order proceeding.

The doctrine of collateral estoppel, or issue preclusion, holds that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982); see also *United States* v. *Mendoza,* 464 U.S. 154, 158 (1984); *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 326 n.5 (1979). The court of appeals correctly concluded that the doctrine is inapplicable here.

First, it is well settled that collateral estoppel applies only when the issue to be litigated in the second proceeding is identical to the issue that was determined in the prior proceeding. See *Montana* v. *United States,* 440 U.S. 147, 153 (1979); *Parklane Hosiery Co.* v. *United States,* 439 U.S. at 327-328; *Commissioner* v. *Sunnen,* 333 U.S. 591, 599-600 (1948). The court of appeals ruled correctly that the issue in the present proceeding is *not* identical to the issue determined by the Eleventh Circuit. All that the Eleventh Circuit held in the prior litigation regarding the scope of the Section 7(a) preference was that the Commission's conclusion that the preference applied in relicensing proceedings as against the original licensee should be upheld as a matter of deference to the Commission. See Pet. App. 325a-326a (citation omitted) ("[w]e have reviewed the Commission's interpretation of this statute and deem such construction consistent with the statute's language, structure, scheme, and available legislative history. We must give great deference to the Commission's

statutory interpretation. The Supreme Court has announced the rule that ' "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong" ' ").

The question in the present case, by contrast, is whether the Commission's new interpretation of Section 7(a) is also entitled to such deference. That question is plainly different from the issue determined by the Eleventh Circuit. The latter court's "decision that [the Commission's interpretation of Section 7(a)] in *Bountiful* was both consistent with the statute and otherwise reasonable does not, as a matter of law or logic, resolve the distinct issue of whether FERC's recent interpretation is also reasonable and in accordance with the statute" (Pet. App. 11a (footnote omitted)).

Petitioner asserts (Pet. 20) that these two issues are simply different sides of the same coin because "the positive of an issue is the same as the negative of an issue." But the court of appeals correctly observed that "an ambiguous or broadly worded statute may admit of more than one interpretation that is reasonable and consistent with Congressional intent" (Pet. App. 11a-12a). The conclusion that one interpretation of a statute is reasonable thus does not necessarily foreclose the conclusion that a contrary interpretation of the statute is also reasonable. See *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 117 (1985) (White, J., concurring); *Bankamerica Corp.* v. *United States*, 462 U.S. 122, 149 (1983) (footnote omitted) (White, J., dissenting) ("[a]gencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. [The Supreme Court] and other courts have approved such administrative 'changes in course,' as long as the new interpretation is consistent with congressional intent."). Indeed, any other result would conflict with the basic rule that when "faced with new develop-

ments or in light of reconsideration of the relevant facts and its mandate, [an agency] may alter its past interpretation and overturn past administrative rulings and practice." *American Trucking Ass'ns* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 397, 416 (1967); accord *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 863 (1984) ("[a]n initial agency interpretation [of its underlying statute] is not instantly carved in stone").[9]

Petitioner and amicus American Public Power Association (APPA) assert that even if the Eleventh Circuit's decision has no preclusive effect the Commission is precluded by its *own* decision in *Bountiful* from revisiting the original licensee issue as it affects entities that participated

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[9] Petitioner attacks the court of appeals' conclusion (Pet. App. 13a n.5) that issue preclusion need not be applied if it would result in inequitable administration of the law. Pet. 17-19; see also American Public Power Ass'n Br. 2-3 n.1. As a threshold matter, the court's observation is relevant only in the event that preclusion is found to be otherwise appropriate because the issues in the two cases are identical. Moreover, there is nothing unprecedented about the court's statement. See Restatement (Second) of Judgments § 28(2)(b) (1982) (preclusion is not appropriate if the issue is one of law and "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws"). The comments to the Restatement state that "it can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of law that affects members of the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of a law" (*id.* § 28 comment c). Since the amendment of Section 7(a) eliminated any preclusive effect that the *Bountiful* decision might have in any other licensing proceeding, the court reasonably concluded that, assuming arguendo that preclusion would otherwise be available, it would be inequitable to deprive the parties in this proceeding of a determination on the merits by the Commission. See Pet. App. 13a-14a n.5.

in that proceeding. But an agency is not precluded from revising its position on a pure question of statutory interpretation, reached in a proceeding that functionally resembled a rulemaking, and applying the revised interpretation to persons who participated in the earlier proceeding.[10] Although the *Bountiful* proceeding was styled an adjudication (see 5 U.S.C. 554(e)) and was conducted pursuant to the Administrative Procedure Act requirements applicable to adjudications, the proceeding in fact resembled a rulemaking. The Commission permitted intervention by a large number of parties (see Pet. App. 336a-337a) and reached a determination regarding a general question of statutory interpretation. See pages 3-4 note 4, *supra*.

In view of the strong policy in favor of allowing administrative agencies to exercise discretion in enforcing the statutes they are charged with administering, application of preclusion principles simply is not proper in a rulemaking setting. That is, an entity is not entitled, by virtue of having participated in a rulemaking, to invoke the preclu-

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[10] Petitioner's reliance (Pet. 15-16) on *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966), is misplaced. There, the Court, in dicta, rejected as "too broad" language in earlier opinions suggesting that preclusion principles are wholly inapplicable in administrative proceedings (384 U.S. at 422). The Court stated that the preclusion doctrine can be invoked to enforce repose between parties to an administrative proceeding when the administrative agency acts in a "judicial capacity" to resolve "disputed issues of fact" (*id.* at 421-422). In *Bountiful*, the Commission was acting only partially in a "judicial capacity" and did not resolve any "issue of fact." Similarly, the Court's approval of the application of the doctrine of collateral estoppel against the United States in *United States* v. *Mendoza*, *supra*, in the context of successive *judicial* proceedings says nothing about whether the doctrine binds an agency in successive *administrative* proceedings of the type presented here.

sion doctrine to insulate itself against the effect of subsequent amendment of the rule. The application of the preclusion doctrine here would have the same untoward effect of limiting an agency's flexibility in carrying out its statutory mandate by forcing the agency to adhere to a general determination of law that the agency now believes to have been erroneous. Cf. Restatement (Second) of Judgments §§ 28 comment c, 29 comment i, 83 comment h (1982) (recognizing exceptions to general rules of issue preclusion with respect to determinations of pure questions of law by an administrative agency charged with enforcing a particular statute); *Second Taxing Dist.* v. *FERC*, 683 F.2d 477, 484 (D.C. Cir. 1982); *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 893-894 (D.C. Cir.) (en banc) (Leventhal, J., concurring), cert. denied, 431 U.S. 974 (1977); *Chern* v. *Bank of America*, 15 Cal. 3d 866, 871, 544 P.2d 1310, 1313, 127 Cal. Rptr. 110, 113 (1976); see also 2 K. Davis, *Administrative Law Treatise* § 18.08, at 597 (1958); see also *United States* v. *Moser*, 266 U.S. 236 (1924).

That conclusion does not leave an administrative body free to change its mind with impunity. The principles governing retroactive application of a legal rule provide ample protection for the rights of affected parties. See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). Here, following a complete analysis of the question, the court of appeals found that retroactive application of the Commission's new interpretation of the statute was permissible (see Pet. App. 14a-25a); petitioner has not sought review of that determination.

Finally, "[i]ssue preclusion * * * attaches only to such issues as the parties litigated adversely to each other in the prior litigation." *Jack Faucett Associates* v. *AT&T*, 744 F.2d 118 (D.C. Cir. 1984), cert. denied, 469 U.S. 1196

(1985); see also Restatement (Second) of Judgments § 38 (1982). Because the Commission and petitioner were on the same side in the *Bountiful* proceeding, petitioner cannot invoke the preclusion doctrine against the Commission here. For all of these reasons, the court of appeals correctly concluded that the Commission was not precluded from adopting its new construction of the statute.

b. The issue here is not, as petitioner and the APPA suggest, whether the doctrine of repose has any application to agency decisions. It is whether an agency, having adopted one interpretation of a statute in a broad rulemaking-type proceeding (albeit one styled as an adjudication), and having later decided that that interpretation was wrong, may apply what it now regards as the better interpretation to entities that participated in the earlier proceeding. That question has apparently not previously arisen, and it is not the subject of any conflict in the courts of appeals. It does not warrant review in a case where the underlying statutory question has been resolved for future cases by congressional action and where there is substantial reason to doubt that petitioner would ultimately prevail on either interpretation of the statute (see page 7 & note 7, *supra*).[11]

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[11] In addition, the present case does not provide a proper factual setting for consideration by this Court of the question whether issue preclusion may be asserted against a government agency on the basis of an administrative proceeding such as the *Bountiful* proceeding. One important factor in determining whether preclusion principles may be applied in connection with rulemaking-type proceedings is the fact that, if preclusion were permitted, a large number of parties would be able to invoke those principles against an administrative agency, requiring the agency to adhere to prior legal determinations and thus depriving the agency of any flexibility in fulfilling its statutory mandate. That important practical consequence is materially distorted in the present case because the intervening congressional

2. Petitioner next asserts (Pet. 20-23) that the Commission's new interpretation of Section 7(a) cannot be sustained. We note as a threshold matter that this question of statutory construction has no continuing importance. While this case was pending before the court of appeals, Congress amended Section 7(a) of the Federal Power Act to eliminate the municipal preference in all relicensing proceedings except the proceeding in the present case. Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, §§ 2, 11, 100 Stat. 1243, 1255. Because the resolution of this issue will therefore affect only the dispute between the parties to this case, review by this Court is plainly unwarranted.

In any event, the court below correctly concluded that the Commission's construction of Section 7(a) is reasonable. In the first place, the language of the relevant statutory provisions supports the Commission's construction. The portion of Section 7(a) (emphasis added) that is relevant here provides that "in issuing licenses to *new licensees* under [Section 15] the Commission shall give preference to applications * * * by States and municipalities." Section 15(a), 16 U.S.C. (& Supp. IV) 808(a), in turn distinguishes between a "new licensee" and an "original licensee." The section gives the Commission two separate options: to "issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations" or to "issue a new license under said terms and conditions to a new licensee." The better reading of

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action has eliminated any possibility that preclusion principles will be invoked by other parties in other proceedings. The facts of this case thus mask the potentially far-reaching effects of the rule of preclusion advocated by petitioner, and the Court therefore should not address that issue in this case.

this language, plainly, is that the municipal preference referred to in Section 7(a) applies only to the second alternative available under Section 15, *i.e.*, the issuance of a new license to a "new licensee"; the preference is not triggered when a new license is issued to the "original licensee." As the court below found (Pet. App. 29a (emphasis in original)), the Commission's reading of these provisions "has the substantial virtue of giving meaning to *all* of the words of the statute and depending *only* on the words that Congress employed in drafting it." Moreover, unlike the construction of the Act urged by petitioner, this approach gives the phrase "issuing [a] license[] to [a] new licensee[]" in Section 7 of the Act the same meaning as that phrase has in Section 15. See Pet. App. 30a-31a.

The court of appeals acknowledged that "the merit of FERC's present interpretation is not entirely free from doubt" because the words "between other applicants" in the second clause of Section 7(a) offer some support for petitioner's view (Pet. App. 30a). But in any event, the court said, "a court cannot substitute what it considers the 'more natural' construction of an ambiguous statute for a reasonable interpretation advanced by an agency. Since it is beyond cavil that section 7(a) is reasonably susceptible to the interpretation proffered by FERC, we are duty bound to uphold it." Pet. App. 31a (citations omitted).[12]

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[12] The court found the legislative history ambiguous with respect to the scope of Section 7(a) (see Pet. App. 31a-32a). The court of appeals also found that the Commission's interpretation of the statute reasonably accommodates "the public and private interests taken into account by the Act" (*id.* at 33a)

Contrary to petitioner's claim (Pet. 21-22), the Eleventh Circuit's decision upholding the Commission's prior construction of the statute does not discredit the decision below. Both courts found the statutory language and legislative history inconclusive and deferred to the administrative interpretation of the statute.

3. Petitioner also challenges (Pet. 23-24) the unanimous conclusion of the Commission (Pet. App 141a-149a), upheld by the court below (*id.* at 33a-35a), that the Commission in a relicensing proceeding may consider the economic impact on consumers of transferring a license from an original licensee to a new licensee. In the absence of a conflict among the courts of appeals with respect to this issue—and petitioner does not assert the existence of a conflict—there is no reason for review by this Court.[13]

Section 7(a) provides that the Commission must evaluate competing applications for hydroelectric power facility licenses by determining which plan is "best adapted to develop, conserve, and utilize in the public interest the water resources of the region." It is well-settled that the term "public interest" in a regulatory statute draws its meaning from the substantive provisions and purposes of the underlying statute. *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976).

The public interest inquiry under other provisions of the Act is quite broad. Thus, in determining the terms to be included in a hydroelectric power license, Section 10(a) of the Act, 16 U.S.C. 803(a), permits the Commission to base its decision upon "an exploration of all issues relevant to the 'public interest,' including future power demand and supply, alternate sources of power, the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife."

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[13] Moreover, this issue has no further importance with respect to relicensing proceedings because Congress has now made clear that the Commission must consider economic impacts in such proceedings. See Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, § 4, 100 Stat. 1245.

Udall v. *FPC*, 387 U.S. 428, 450 (1967); see also *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 757-758 (1973); accord *Municipal Electric Ass'n* v. *FPC*, 414 F.2d 1206 (D.C. Cir. 1969); *Citizens for Allegan County* v. *FPC*, 414 F.2d 1125, 1130 (D.C. Cir. 1969); *National Hells Canyon Ass'n* v. *FPC*, 237 F.2d 777, 782 (D.C. Cir. 1956), cert. denied, 353 U.S. 924 (1957).

The court of appeals correctly concluded that "the breadth of the public-interest inquiry permitted under section 10(a) should inform the interpretation of section 7(a)'s directions as to who should hold the license" (Pet. App. 35a). The Commission's Section 7(a) inquiry therefore may include the potential economic consequences of its licensing determination. See Pet. App. 33a-35a, 141a-149a, 389a-392a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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